

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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NOV 17 2009

RE: MUR 6170
Tuscola County Democratic
Committee

Dear Mr. Nickelhoff:

On February 11, 2009, the Federal Election Commission ("Commission") notified your client, the Tuscola County Democratic Committee ("the Committee") of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your client, the Commission, on November 3, 2009, voted to dismiss this matter and accordingly, closed its file in this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Based on the information before the Commission, it appears that the Committee may have failed to use appropriate disclaimers. Specifically, when any person "makes a disbursement for the purpose of financing any communications expressly advocating the election or defeat of a clearly identified candidate, ... through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising," and that communication is not authorized by the candidate, an authorized political committee of a candidate, or its agents, it must place a disclaimer in the communication identifying the name, permanent street address, telephone number or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee. See 2 U.S.C. § 441d; 11 C.F.R. § 110.11. The communications by the Committee failed to include the telephone number or World Wide Web address of the Committee, and failed to state that the communications were not authorized by any candidate or candidate's authorized committee, or agents thereof. The Commission cautions the Committee to ensure compliance with 2 U.S.C. § 441d and 11 C.F.R. § 110.11 in the future. Further, it appears the Committee may have failed to report independent expenditures. Under the Act, every person other than a political committee who makes independent expenditures in excess of \$250 must file a report that discloses information on its expenditures and identify each person who made a contribution in excess of \$200 for the purpose of furthering an independent

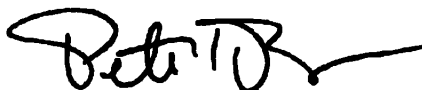
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expenditure. See 2 U.S.C. § 434(c). The Commission cautions the Committee to ensure compliance with 2 U.S.C. § 434(c) in the future.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

If you have any questions, please contact Audra Hale-Maddox, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Peter G. Blumberg
Assistant General Counsel

Enclosure

Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Tuscola County Democratic Committee

MUR: 6170

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by Jeff Timmer on behalf of the Michigan Republicans. See 2 U.S.C. § 437g(a)(1).

II. FACTUAL SUMMARY

The complaint alleged that the Tuscola County (Michigan) Democratic Committee ("TCDC" or "the Committee"), a local party committee of the Michigan Democratic Party, has failed to register with and report to the Commission as a federal political committee despite exceeding the threshold for federal political committee status by making \$400 in direct contributions to the Kildee for Congress federal campaign and by making expenditures of over \$1,000 for newspaper ads that promoted or supported the election of federal candidates Barack Obama, Joseph Biden, Carl Levin, and Dale Kildee, in violation of 2 U.S.C. §§ 433(a) and 434 of the Federal Election Campaign Act of 1971, as amended ("the Act"). In addition, the complaint alleged that the TCDC's "public communications ... probably failed to include the appropriate disclaimer in violation of 2 U.S.C. § 441d(a)." Complaint at 3.

The response asserts that the Committee did not meet the threshold for political committee status by making \$1,000 in contributions or by making \$1,000 in expenditures. See 2 U.S.C. § 431(4)(C). The response admits that the disclaimers "did not state that the ads were not authorized by a candidate or candidate committee," but asserts that the disclaimers otherwise

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met all of the Act's requirements. Response at 5. Also, the response acknowledges that the Committee failed to disclose its independent expenditures.¹ *Id.*

The available information indicates that the TCDC did not meet the Act's threshold requiring registration and reporting as a political committee. See 2 U.S.C. § 431(4)(C). However, it appears that the TCDC failed to place fully compliant disclaimers on its advertisements and failed to file required independent expenditures reports. Nevertheless, for the reasons set forth below, the Commission exercises its prosecutorial discretion and dismisses the complaint with a cautionary letter to the Tuscola County Democratic Committee. See *Heckler v. Chaney*, 470 U.S. 821 (1985).

III. FACTUAL AND LEGAL ANALYSIS

A. Political Committee Status

The TCDC acknowledges that it is a "local committee of a political party," as defined in the Commission's regulations. See 11 C.F.R. § 100.14(b) (an "organization that by virtue of the by-laws of a political party or the operation of State law is part of the official party structure, and is responsible for the day-to-day operation of the political party at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State"). Any local committee of a political party which makes contributions aggregating in excess of \$1,000 or makes expenditures aggregating in excess of \$1,000 during a calendar year, which receives contributions in excess of \$5,000 in a calendar year, or which makes payments exempted from the definition of contribution or expenditure aggregating in excess of \$5,000 during a calendar year meets the threshold definition for a political committee. 2 U.S.C. § 431(4)(C); 11 C.F.R. § 100.5(c). Political committees must file a Statement of Organization with the Commission within 10 days of meeting the threshold definition found in 2 U.S.C. § 431(4)(C),

¹ The Complaint did not make any specific allegations regarding this issue.

1 and must file reports that comply with 2 U.S.C. § 434. 2 U.S.C. §§ 433(a), 434(a)(1); *see also*
2 11 C.F.R. §§ 102.2, 104.1, 105.4.

3 Citing the Committee's Michigan Bureau of Elections reports (attached to the complaint),
4 the complaint alleges that the TCDC contributed \$400 to Kildee for Congress, and made
5 expenditures of \$1,830 for newspaper advertisements in the *Tuscola County Advertiser*, \$261.23
6 for an ad in the *Cass City Chronicle*, and \$357.50 for an ad in the *Vassar Pioneer Times*, all of
7 which "referred to Barack Obama, Joe Biden, Carl Levin, and Dale Kildee, and promoted or
8 supported such candidates for Federal office." Complaint at 2. The complaint adds the federal
9 contributions made by TCDC to the total spending for the advertisements in question and alleges
10 that the TCDC surpassed the threshold for registering and reporting as a political committee.
11 Complaint at 3. The response acknowledges that TCDC made \$400 in contributions to Kildee
12 for Congress, but argues that the contributions should not be added to the expenditures for
13 purposes of determining whether the political committee status threshold has been met, citing
14 2 U.S.C. § 431(4)(C). Response at 1-2. Neither does the response dispute that the newspaper
15 ads "supported both candidates for federal office and candidates for state and local office," but it
16 notes that expenses for these advertisements can be allocated, based on the space occupied,
17 among the identified federal candidates and the identified non-federal candidates. Response at 2.
18 The response asserts that the allocated federal expenditure is \$810.52 for the federal portion of
19 the \$2,448.73 total costs, which is below the \$1,000 threshold for political committee status. *Id.*

20 The Act does in fact set forth separate thresholds of \$1,000 for contributions and \$1,000
21 for expenditures for political committee status. See 2 U.S.C. § 431(4)(C) ("...makes
22 contributions aggregating in excess of \$1,000 or makes expenditures aggregating in excess of
23 \$1,000 during a calendar year ...") (emphasis added). As the Committee made only \$400 in

1 federal contributions, it did not meet the contributions threshold; the Commission must consider
2 separately whether the Committee met the expenditures threshold.

3 In support of its allegation that the Committee met the expenditures threshold, the
4 complaint also alleges that the entire costs for the ads in question were expenditures because
5 only federal funds were permitted to be utilized by the TCDC for its newspaper ads that
6 promoted or supported the federal candidates Barack Obama, Joe Biden, Carl Levin and Dale
7 Kildee, and it alleges that the requirement to use only federal funds means that the entire costs
8 constitute expenditures under the Act. Complaint at 2-3, citing 11 C.F.R. § 300.33(c). As a
9 result of spending \$2,448.73 on the ads, the complaint concludes, the TCDC spent more than
10 \$1,000 on expenditures during 2008 and thus met the Act's political committee status threshold.
11 *Id.* at 3.

12 In determining whether an organization makes an expenditure by paying for
13 communications, the Commission "will analyze whether expenditures for any of an
14 organization's communications made independently of a candidate constitute express advocacy
15 either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)." *See*
16 Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595,
17 5606 (February 7, 2007). The newspaper ads, which appear to be identical in content (with the
18 exception of one item identified as a "sticker on the front page of the November 1, 2008 Tuscola
19 County Advertiser"²) all contained express advocacy under 11 C.F.R. § 100.22(a) because the
20 ads contain pictures of various Federal candidates (as well as non-Federal candidates), under
21 which the captions urge recipients to "Elect" or "Re-elect" the candidates by name. The use of
22 the words "Elect" and "Re-elect" next to the names of Federal candidates fall squarely within the

² A copy of this sticker included with the response was too dark to read, but the response identifies the sticker as listing the names of 11 candidates, including federal candidates Barack Obama, Joseph Biden, Carl Levin and Dale Kildee. Response at 3.

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1 definition of express advocacy. *See* 11 C.F.R. § 100.22(a). For this reason, an analysis of this
2 communication under 11 C.F.R. § 100.22(b) is unnecessary.

3 The TCDC newspaper advertisements mention or depict both federal and state
4 candidates. *See* Attachment 1. TCDC's response to the complaint argues that only the costs
5 associated with the federal portion of the advertisements count towards the \$1,000 expenditure
6 threshold. Response at 2; *see also* 11 C.F.R. §§ 106.1(a)(1) and (c)(3). TCDC provided a copy
7 of its newspaper advertisements and detailed calculations of the federal allocations based on the
8 amount of space in its newspaper ads addressing federal candidates as a proportion of the overall
9 space of the ads, concluding that its total federal expenditures totaled \$810.52. Response at 3-4.³
10 The total federally allocated expenditure of \$810.52 is less than the Act's \$1,000 expenditure
11 threshold for political committee status. *See* 2 U.S.C. § 431(4)(C).

12 Finally, regardless of whether a local party committee exceeds one of the registration
13 thresholds making it a federal political committee, it must finance activities in connection with
14 federal elections with funds that comply with the federal contribution limits and prohibitions.
15 11 C.F.R. § 102.5(b). The committee must demonstrate through a reasonable accounting method
16 that it has received sufficient funds subject to the limitations and prohibitions of the Act to fund
17 its federal contributions and expenditures. Here, TCDC states in its response that the Michigan
18 Campaign Finance Act has equivalent prohibitions and limitations to those in the Act, and that
19 therefore all of the TCDC's funds are appropriate federal funds. *See* Response at 4-5; *see also*
20 M.C.L. §§ 169.254, 169.242, and 169.244. Further, TCDC's pre-general election and post-

³ For example, one ad in the *Tuscola County Advertiser* cost a total of \$542, and consists of two portions. *See* Response at 3. The first portion, which comprises 77% of the total ad space, contains photographs of ten candidates, four of whom are federal candidates. The second portion, which comprises 23% of the total ad space, contains the names and offices sought of 74 candidates, four of which are federal. Response at 3 and Exhibit B (Attachment 1). TCDC calculated the federal allocations as 40% of the first portion and 5.4% of the second portion, then multiplied these percentages by 77% and 23%, respectively, for a total federal allocation of \$173.67. The response's calculations regarding the other ads in the complaint are similar to this analysis.

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1 general election state disclosure reports for the periods of August 26, 2008 though October 19,
2 2008 and October 20, 2008 through November 24, 2008 do not itemize any donations that would
3 violate the Act's limitations or source prohibitions. (Reports available online at
4 http://miboecfr.nictusa.com/cgi-bin/cfr/com_det.cgi?com_id=1617, last accessed on September
5 9, 2009). Accordingly, the TCDC appears to have made its contributions or expenditures using
6 federally permissible funds. As the Committee's federal expenditures of \$810.52 did not exceed
7 the political committee status threshold, and as the Committee's spending on federal expenditures
8 and contributions appears to have been made from federally permissible funds, there is no reason
9 to believe that the Committee violated the Act as to these allegations.

10 **B. Disclaimers**

11 The complaint alleged that the TCDC's public communications "probably" failed to
12 include appropriate disclaimers. Complaint at 3. Any person making a disbursement for
13 communications expressly advocating for a clearly identified federal candidate is responsible for
14 adhering to the disclaimer requirements in 2 U.S.C. § 441d. *See also* 11 C.F.R. § 110.11(a)-(c).
15 The TCDC advertisements expressly advocate for the election of federal candidates Barack
16 Obama, Joseph Biden, Carl Levin, and Dale Kildee. *See* discussion on p. 5, *supra*. The TCDC's
17 advertisements contain some of the elements of a conforming disclaimer (*i.e.*, the name of the
18 entity paying for the advertisement and the P.O. Box mailing address of the TCDC), but the
19 disclaimers do not state whether the communications are authorized by any federal candidate or
20 candidate's committee. *See* 2 U.S.C. § 441d and 11 C.F.R. §§ 110.11(a)-(c). The disclaimers on
21 the TCDC's advertisements therefore appear to be in violation of 2 U.S.C. § 441d.

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C. Independent Expenditure Reporting

The newspaper ads at issue appear to be independent expenditures pursuant to 2 U.S.C. § 431(17) because, as discussed above, they expressly advocate the election of clearly identified federal candidates, and the advertisements do not appear to have been "made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents" 2 U.S.C. § 431(17). Under the Act, every person other than a political committee who makes independent expenditures in excess of \$250 must file a report that discloses information on its expenditures and identify each person who made a contribution in excess of \$200 for the purpose of furthering an independent expenditure. See 2 U.S.C. § 434(c). Even though the TCDC has not exceeded the political committee status threshold, it still would have been required to report the costs for the newspaper advertisements because they were independent expenditures of more than \$250 for the 2008 general election. See 11 C.F.R. § 106.1(a)(1). The TCDC's response acknowledges that it failed to file FEC Form 5 disclosing the expenditures, see Response at 5, and its failure to report these independent expenditures appears to be a violation of the Act. See 2 U.S.C. § 434(c).

D. Conclusion

Although there appears to be no reason to believe that the TCDC has met the threshold definition for a political committee at 2 U.S.C. § 431(4)(C), and therefore there is no reason to believe that the TCDC has failed to register with or report to the Commission as required by 2 U.S.C. §§ 433(a) or 434(a), the TCDC may have violated 2 U.S.C. §§ 434(c) and 441d. However, due to the the modest amount in violation in this case, pursuit of this matter would not merit the further use of Commission resources. See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545-6

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- 1 (Mar. 16, 2007). Accordingly, the Commission exercises its prosecutorial discretion and
- 2 dismisses the complaint, and cautions the TCDC regarding the disclaimer requirements and the
- 3 independent expenditure reporting requirements of the Act. *See Heckler v. Chaney*, 470 U.S.
- 4 821 (1985).

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